RECENT COURT RULINGS ON TAKINGS AND THE POSSIBLE IMPACT ON THE ABANDONED MINE LAND PROGRAM

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Historically, governments from the local to the federal level have used different forms of zoning and the exercise of the police power in addition to eminent domain to control land use. The key justification has been to prevent public nuisance or noxious uses. Traditional uses of these powers have been zoning to control the location of industrial, commercial, and residential areas and the acquisition of land for public development. Recently there have been prohibitions on development of land in order to prevent or abate environmental degradation and threats to public safety.

In the past 25 years, with the increased use of regulatory control, have come court challenges asserting that such restrictions have violated the takings provisions of the Fifth and Fourteenth Amendments to the Constitution.

The purpose of this discussion is to chronologically review a series of rulings by state supreme courts, federal courts, and the Supreme Court. From this, some observations may be drawn as to possible ways to lessen exposure of the abandoned mine land (AML) program in this environment. There is also a caveat here. Any actions in response to court rulings should be discussed with agency attorneys.

Before proceeding with the recent rulings, note should be taken of the "grandfather" of rulings in this field. In 1922 the Supreme Court ruled on Pennsylvania Coal Company v. Mahon, et al. (260 U.S. 393). The court overturned a Pennsylvania law forbidding the removal of support from beneath structures even when the right of support had been deeded away. In what became a seminal ruling Justice Holmes noted that government couldn't function if every change in law that reduced property value required compensation. However, **"When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act."** Otherwise the use of the police power would increase until private property rights disappear. Justice Brandeis in dissent noted that private property rights are not absolute and that contracts between individuals could not bargain away the State's police power authority.

The first of the recent regulatory rulings by the Supreme Court occurred in 1978 in Penn Central Transportation Co. v New York City (438 U.S. 104). In this ruling delivered by Justice Brennan the court ruled that the New York Landmarks Law did not commit a taking when Penn Central was forbidden from building a tower over Grand Central Station. It noted that the Law didn't transfer control of the property to the city. It only restricted its use and this didn't go too far as Justice Holmes had noted in his ruling. The court noted that this hadn't so frustrated investment-backed expectations as to constitute a taking, didn't prevent Penn Central from making a reasonable return on the property, and had provisions to mitigate the impact. Justice Rehnquist in dissent noted that the law had been applied to so few private structures that it could not be considered zoning and that valuable rights had been destroyed. He pointed out that the Fifth Amendment bars the "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

In 1982 in Loretto v Teleprompter Manhattan CATV Corp. (458 U.S. 419) the Supreme Court ruled on a physical taking. In this case, contrary to its rulings on regulatory takings, the Court held that any "physical invasion of private property" was a taking.

In 1987 in Nollan v California Coastal Commission (483 U.S. 825) the Supreme Court made a significant ruling regarding regulatory restrictions on land use. The commission had tried to require the Nollans to grant an easement across their land as a prerequisite for construction of a house. As Justice Scalia pointed out the demand for an easement wasn't related to the purpose of the permit process and therefore wasn't a legitimate use of the regulations. It was also pointed out that the nature of the easement was such that it amounted to a seizure of the land that went beyond acceptable limits for regulation. As such the state would have to use eminent domain and pay for the easement instead of forcing the landowners to contribute to the program without compensation. Of particular interest to the AML program is the notation that the Nollans' interest was not diminished by the fact that they acquired the land well after the beginning of the government policy. Since prior owners couldn't be deprived of the easement without compensation, the interest must have been transferred to the Nollans with the deed.

1992 brought a very significant ruling on the ability of government to deny the use of land through regulation. In Lucas v South Carolina Coastal Commission (505 U.S. 1003) the Supreme Court ruled that regulations that deny all "economically viable use" of land are a form of taking that requires compensation. The ruling delivered by Justice Scalia further noted that use of the justification that an action confers benefits, expanding the concept of prevention of harmful use, cannot expand the exception to the compensation requirement. The Court noted that the only exception in this case would be if background principles of property law and nuisance that inhere in the land title itself allowed a total prohibition on development.

The United States Court of Appeals in 1995 issued a ruling that supported the regulatory powers of the Surface Mining Control and Reclamation Act (SMCRA). In the case M & J Coal and Monogah Development Company v The United States (47 F.3d 1148) the court found that all land is held under the restrictions against harmful or nuisance uses. Thus the regulatory exercise of police power to prevent such use, in this case mining that causes subsidence damage, is not prohibited by the Fifth and Fourteenth Amendments.

In a somewhat peripheral ruling the Supreme Court in 1998 ruled in Eastern Enterprises v Kenneth S. Appel, Commissioner of Social Security, et al. (524 U.S. 498) that Congress had committed a taking under the Fifth Amendment. The Court ruled that making a company retroactively pay benefits years after it left coal mining was a taking since it overturned the legal contracts on benefits negotiated while the company was in the industry.

2001 saw two rulings on regulatory takings cases. The first was Anthony Palazzolo v Rhode Island et al. (533 U.S. 606). This dealt with several contentious issues; the "ripeness" standard for court appeals, the right of a post-act landowner to appeal a regulation, and the question of when a regulation commits a taking.

Ripeness is the concept that the Court will not decide issues until it is necessary. From a practical standpoint this is usually interpreted to mean that an appellant has not exhausted all attempts to obtain a permit from a regulatory agency. In the Palazzolo case Justice Kennedy, speaking for the Court, ruled that, given the nature of the regulation and the rulings on previous permit requests, the landowner had made a reasonable effort and the case could be considered "ripe." There was no need to submit an endless string of applications.

The Court also ruled that the landowner was not barred from making a takings claim by the fact that he acquired title after the act was passed. Justice Kennedy pointed out this would change the basic nature of property rights since government could put a limit on the Takings Clause in this manner and prejudice both the owners of property at the time regulation was enacted and subsequent owners since a property right would have disappeared from the ownership "bundle" they acquired. Thus transfer of title could not convert an unconstitutional taking into a "background principle" of state law.

Finally the Court ruled that, given testimony in the case the taking had not been categorical, that is a total taking. The case was thus remanded to the lower court to determine if a taking great enough for compensation had occurred under previous court rulings.

Hard on the heels of the Palazzolo ruling came the ruling of the Federal Circuit Court of Appeals in Rith Energy, Inc. v United States (247 F.3d 1355). In this case the court referred to the Palazzolo ruling in forming an opinion on investment backed expectations and post-act acquisition of land. It noted that a categorical taking had not occurred and that diminution of value alone did not constitute a taking. The ruling pointed out that the appellant was operating in a highly regulated industry and thus could expect unfavorable rulings. This affected the expectations for profit. It further pointed out Rith had performed a significant amount of mining, indeed turning a profit on the investment, which eliminated any claim of a taking. Subsequently the Supreme Court refused to review the case.

In the spring of 2002 the Supreme Court evaluated the concept of a taking through regulatory delay in Tahoe-Sierra Preservation Council, Inc., et al., v Tahoe Regional Planning Agency et al. (535 U.S.). Justice Stevens writing for the court ruled that a temporary moratorium on land use during a regulatory process did not constitute a taking. It was pointed out that reasonable delays could be expected in a regulated environment and that fluctuations in value such as those caused by such a delay were to be expected as part of ownership. Further it was pointed out that land must be taken as a whole in considering a taking, and can no more be divided into a series of limited temporal parcels than a group of individual tracts of limited area or volume.

In 2002 the Supreme Court of Pennsylvania made another significant ruling on a regulatory takings case. In a ruling on a question of a taking in Marchipongo Land and Coal et al. v Commonwealth of Pennsylvania et al. (J-172-2001) the court dealt with a lands unsuitable ruling. Referring repeatedly to the recent Supreme Court rulings, the court reversed the lower court ruling that a taking had occurred. Noting that the taking was not categorical in that testimony had shown some tracts had other revenue streams, it remanded the case for evaluation of the individual tracts involved under both categorical and "Penn Central" standards as appropriate. It also required the lower court to consider whether the proposed land use would be a nuisance and therefore exempt from takings under state police power authority. Finally it noted for one parcel that a taking cannot occur when the property has no value.

Finally, in somewhat of a side note, a wire service news article on May 25, 2002 reported that Broward County, Florida Circuit Judge Leonard Fleet ruled that a state law allowing judges to issue countywide warrants to cut citrus trees was a violation of the Fourth Amendment not the Fifth.

An examination of the rulings would seem to generate a mixed bag for the future of the act. The power to enforce regulatory control over mining and declare lands unsuitable has been upheld with significant potential restrictions. Several rulings have clearly stated that a change in

law cannot remove pre-existing rights in land. Thus the implication is that if a landowner had mineral rights which had a value based on economic expectations, someone acquiring the land after 1977 retains those rights. The only indicated exception is nuisance law. Furthermore, the rulings indicate that the Court may strictly limit attempts to expand the nuisance concept to include actions for "public benefit." Thus, rulings based on scenic value and watershed value may be impacted.

Abandoned mine reclamation projects where written consent has been obtained would seem to be less impacted but still require caution. Careful coordination between realty and project personnel from the start of project planning, with an eye toward any physical "taking" of property value, is necessary. The new environment suggests less use of standard forms and more use of site-specific forms that detail proposed changes in the land. In this way the landowner will have approved any change in land in exchange for the abatement work. This would probably help alleviate any claim of a "taking." This will put additional demands on project personnel to be aware of the economic impact of reclamation plans. When the proposed work will reduce the value of property, for example when landslide reclamation requires the grading and removal of a level home site, the project manager will need to discuss this with realty staff. The main question will be whether a site-specific form will be needed. In addition changes in the scope of work during abatement will have to be evaluated. The change may require an additional site specific right of entry form in place of an earlier standard form, or the modification of an earlier site-specific form.

The situation may even require some value friendly engineering. It may be necessary to discuss the work with the landowner and realty staff and modify the plans as a result of the discussion. The source of material to be borrowed may be changed to avoid removing a level home site. A drainage ditch may be changed to a buried pipe to reduce the impact on property value. Drainage channels my be rerouted to follow property boundaries where possible rather than cutting across the middle of a parcel of land. These are examples of modifications that with a little ingenuity can lessen the impact of work and reduce the potential problems in the current legal environment.

As opposed to issues involving voluntary consent to enter property, the ability to exercise the police power authority in emergency and high priority programs would seem to be indirectly endorsed to allow the control of nuisance or noxious situations, or to prevent harm to the public. One possible concern might be in cases where a physical taking occurs. In this case any taking may be considered subject to compensation as an act of eminent domain. A question for the staff attorneys might be, "What happens if we remove or greatly decrease the level land, i.e. the home site on a property?" Is this a physical taking that requires compensation no matter how small? The act of physically entering property, even for a limited time, may be considered a taking and permanent removal of value may also be called a taking. As such the court may rule that this cannot be offset by the value of the construction work. The first precaution to be taken in such situations is to immediately have an appraisal performed. Thus, should a police power be challenged, there will at least be a pre-existing value of the property on record, as well as an after value.